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In The
Supreme Court Of The United States

OCTOBER TERM, 1985

SPIROS KOUTSOUBOS, Administrator of the Estate of JAMES KOUTSOUBOS,
Petitioner,

v.

BOEING VERTOL, DIVISION OF THE BOEING COMPANY AND THE BOEING COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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1 APP

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

(i) Does a government contractor have to prove some form of government compulsion as to design in order to be immune from liability for damages caused by design defects?

(ii) Does government approval of the design of military equipment immunize a government contractor from liability for injuries to servicemen resulting from design defects which were known or should have been known by the manufacturer but which may not have been known by the government at the time of approval?

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, SPIROS KOUTSOUBOS, Administrator of the Estate of JAMES KOUTSOUBOS, Deceased, respectfully prays that a Writ of Certiorari issue

to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, made and entered in this proceeding on February 27, 1985.

The citation of the Third Circuit opinion is *Koutsoubos v. Boeing Vertol*, 755 F.2d 352 (3rd Cir. 1985) (Appendix C). The citation of the District Court opinion granting partial summary judgment is *Koutsoubos v. Boeing Vertol*, 553 F.Supp. 340 (E.D. Pa. 1982) (Appendix A).

A. THE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(i) The judgment or decree sought to be reviewed is the opinion of the United States Court of Appeals for the Third Circuit, made and entered February 27, 1985.

(ii) A petition for rehearing was not filed.

(iii) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by Writ of Certiorari is 28 U.S.C. § 1254(1).

B. CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS.

This case arises under the Death on the High Seas Act, 46 U.S.C. §§ 761-767. This appeal does not, however, involve issues with respect to the language of such sections, but, rather, the question of immunity from liability arising under case law.

C. STATEMENT OF THE CASE.

In this case, the Plaintiff's decedent was one of three Navy crewmen who were killed while on a helicopter training flight off the coast of Florida. The helicopter, which was manufactured by the Defendants for the Navy, was making an approach to a floating smoke flare when it hit the water, turned over and sank. The Plaintiff filed suit alleging that the helicopter was unsafe due to defects in the design. The District Court found: (1) that the Navy had approved the final contract specifications for the helicopter; (2) that the helicopter met the contract specifications in all material respects; and (3) that the Navy knew as much or more than Boeing about the hazards associated with the product. Judgment was entered for the Defendants and the Third Circuit affirmed.

In its bench opinion of February 15, 1984, the District Court stated that "Boeing played a major role in shaping the specifications governing the (helicopter). . . ." (12A). The District Court found that some specifications originated with Boeing which then initiated an extended period of "back-and-forth" discussions between Boeing and the Navy, "with the Navy always, expectedly and properly, having the responsibility for and exercising responsibility for making final decisions as to specifications." (12A-13A).

The Third Circuit Court of Appeals approved of the District Court's reliance upon Judge Pratt's three-part test for the "government contractor" defense first announced in *In re "Agent Orange" Product Liability Litigation*, 534 F. Supp. 1046 (E.D.N.Y. 1982) and then redefined by the Ninth Circuit in *McKay v. Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983), cert. denied, _____ U.S. _____, 104 S. Ct. 711 (1984). The Third Circuit rejected Plaintiff's argument that some government "compulsion" or "control" was a necessary element for the military contractor to avoid liability for defective designs. The Third

Circuit in this case has held that a military supplier or "government contractor" is immune from liability for design defects if the military approved reasonably detailed specifications for the product.

The jurisdiction of the United States District Court was in admiralty under the Death on the High Seas Act, 46 U.S.C. §§ 761-767.

POINT I. THE THIRD CIRCUIT OPINION OVERLOOKS CRITICAL ECONOMIC FACTORS AND PUBLIC POLICY CONSIDERATIONS THAT SUPPORT THE STRICT LIABILITY OF GOVERNMENT CONTRACTORS.

The Third Circuit opinion in the case at bar rejects the policy considerations behind strict liability and ignores the realities of our economic system. Strict liability places the burden of liability on the party who is in the best position to correct the tortious act or omission. See *"Agent Orange," supra*, 506 F. Supp. at 793. Manufacturers, when faced with strict liability for damages caused by defective products, will be encouraged to discover design defects and make improvements. If a manufacturer is relieved from strict liability, the long run costs to the government due to accidents and mishaps caused by defective, unsafe equipment will increase. However, manufacturers who suffer liability because their products are defective cannot readily pass on these costs to the government due to the lower bids of their safer competitors. In a precise and thoughtful dissent in *McKay, supra*, Judge Alarcon criticized the majority's reasoning in *McKay*, the same reasoning which was followed by the Third Circuit in this case.

> While there is no doubt that some of these liability costs will find their way into overall bid costs, this is to a certain extent inevitable. The free market

> system, however, insures that this cost transfer will be minimized. Just as some manufacturers are better at minimizing the cost of overhead, others will be better at producing safe designs and avoiding liability. Bid price competition and the cost of liability provide incentives to minimize both. Footnote eight of the *Stencel* opinion concedes this system's existence and recognizes that one way or another, all costs incident to manufacture get passed on to the customer, whether or not it is the Government. As long as our economy continues as a free market system this court should refrain from denying its realities.

Id., 704 F. 2d 457-458 (Alarcon, J. dissenting).

Judge Alarcon's analysis does not apply to those manufacturers who are unable to contract "at arms length." In those situations where some form of compulsion exists and the government actually controls the specifications for the product, the contractor should be immune from suit. If a military contractor is in fact unable to negotiate over specifications which, due to defense requirements, involve risks that would be deemed unreasonable for ordinary consumer goods, then it would be unfair to hold the contractor strictly liable. In the case at bar, however, Boeing did negotiate over the specifications and played a "major role" in the design of the helicopter. Boeing, therefore, should be held liable for its own negligence and for any defects in the design.

The Third Circuit argues that "if any involvement by the contractor would defeat the defense, there would be no incentive for contractors to work closely with the military; on the other hand, where there is no government participation in the preparation of specifications the rationales for the defense do not apply." (33A). The Third Circuit affirmed because it found that there was enough "government participation" to justify extending the government's

immunity to Boeing. Boeing's "major role" was overlooked by the Third Circuit in order to provide an incentive for Boeing and other contractors "to work closely with the military."

The reasoning of the Third Circuit ignores the fact that there are more than a few contractors eager to do business with the government. Manufacturers will either work closely with the military authorities in the development of equipment or risk losing their lucrative contracts. Competition among government contractors ensures that each will strive to work closely with military authorities. Limiting the government contractor defense to situations involving government compulsion or control will not significantly affect this working relationship.

Competition and strict liability will ensure that both short-run and long-run costs to the military are minimized. Government contractors should not be immune from liability for defective designs unless there was some form of government compulsion or control with respect to the specification. In the case at bar, there was no government compulsion or control because Boeing had played a "major role" in developing the design.

POINT II. THE THIRD CIRCUIT OPINION IS A DEPARTURE FROM AND IS IN CONFLICT WITH SUBSTANTIAL PRE-EXISTING CASE LAW.

The government contractor defense arose from cases involving claims against public works contractors for damages to land and other property. See generally Annotation, *Right of Contractor with Federal, State, or Local Public Body to Latter's Immunity from Tort Liability,* 9 A.L.R. 3d 382 (1966); Note, *Liability of a Manufacturer for Products Defectively Designed by the Government,* 23

B.C. L. Rev. at 1049-55. A conflict has developed in the Circuit Courts as to whether the government contractor defense should apply to product liability actions. This conflict was summarized in the recent case of *Johnston v. United States*, 568 F. Supp. 351, 356 (D. Kan. 1983).

> In a handful of relatively recent cases, however, all involving products produced for the military, the government contract defense has been extended to products liability actions for personal injury. *See* Note, *supra*, 23 B.C. L. Rev. at 1055-64; *McKay, supra*, 704 F. 2d at 448-49. A few courts have flatly rejected the doctrine, see *Challoner, supra; Foster v. Day & Zimmermann, Inc.*, 502 F.2d 867 (8th Cir. 1974), but others have accepted it, *McKay*, supra; *Agent Orange, supra; Sanner v. Ford Motor Co.*, 144 N.J. Super. 1, 364 A.2d 43 (1976), *aff'd* 154 N.J. Super. 407, 381 A.2d 805 (1977), *cert. denied* 75 N.J. 616, 384 A.2d 846 (1978); *Casabianca v. Casabianca*, 104 Misc. 2d 348, 428 N.Y.S. 2d 400 (Sup. Ct. 1980).

Id.

The long-recognized element of government compulsion in affording immunity from strict liability to the manufacturer of a government product is illustrated in the case of *Merrit, Chapman & Scott Corp. v. Guy F. Atkinson Co.*, 295 F.2d 14 (9th Cir. 1961), wherein the Court held that the government contractor defense was not available to a contractor who designed and constructed a defective temporary dam pursuant to governmental plans and specifications. "It is elementary that compulsion must exist before the 'government contract defense' is available." *Id.*, 295 F.2d 16.

In *Boeing Airplane Co. v. Brown*, 291 F.2d 310 (9th Cir. 1961) (relied upon in *O'Keefe v. Boeing Company*, 335 F. Supp. 1104 (S.D.N.Y. 1971)) a plane manufacturer

attempted to avoid liability because the Air Force had approved the design of the defective product prior to its manufacture, supervised its manufacture, monitored the qualifications and production testing and accepted the completed aircraft. In rejecting this defense, the Court recognized that the manufacturer should be liable for its own defective design despite government approvel with no compulsion.

Historically, government contractors who design and supply aircraft to the military have been liable in negligence and strict liability for the design of the aircraft and component parts sold to the military which injure or kill servicemen. See *Boeing Airplane Co. v. Brown*, 291 F.2d 310 (9 Cir. 1961) (negligent design of a component part of a B-52, death of the crew); *Moywer v. Martin Marietta Corp.*, 481 F.2d 585 (5 Cir. 1973) (negligent design of the ejection seat in a B-57A, death of the pilot); *Kropp v. Douglas Aircraft Co.*, 329 F. Supp. 447 (E.D.N.Y. 1971) (negligent design of the ejection door in a A3A jet bomber, death of the crewmen); *Lindsay v. McDonnell Douglas Corporation*, 460 F.2d 631 (8 Cir. 1972) (strict liability in the design and manufacture of a F-4B, death of the crewmen); *Renner v. Rockwell International Corporation*, 403 F. Supp. 849 (C.D. Cal. 1975) (vacated on other grounds) 587 F.2d 1030 (negligence and strict liability for design and manufacture of a RA-5C aircraft tail hook, death of the crewmen); *O'Keefe v. Boeing*, 335 F. Supp. 1104 (S.D.N.Y. 1971) (negligent design of a B-52 bomber, death of the crew); *Quadrini v. Sikorsky Aircraft Division, United Aircraft Corporation*, 425 F. Supp. 81 (D. Conn. 1977) (negligence and breach of warranty action for death of two Marine Majors in a helicopter crash); *Jennings v. Goodyear Air Corp.*, 227 F. Supp. 246 (D. Del. 1964) (negligence and breach of warranty action for death of crewman in Navy dirigible crash); *Montgomery v. Goodyear Tire & Rubber Co.*, 231 F. Supp. 447 (S.D.N.Y. 1964) (negligence action for

death of crewmen in a blimp crash) *North American Aviations, Inc. v. Hughes,* 247 F.2d 517, 520 (1 Cir. 1957) (liability for death of the pilot due to negligent manufacture and inspection of an F-86F aircraft).

The Third Circuit in this case, like the Ninth Circuit in *McKay v. Rockwell International Corp.,* 704 F.2d 444 (9th Cir. 1983), cert. denied, _____ U.S. _____, 104 S.Ct. 711 (1984), has rejected the strict liability of a contractor whose defectively designed product has been approved by the government. To support this expansion of the "government contractor" defense, the Third and Ninth Circuits have reasoned that the contractor, if held liable, will pass on the liability cost to the government and thereby defeat the government's immunity from tort liability to military personnel under *Feres v. United States,* 340 U.S. 135 (1950) and *Stencel Aero Eng. Corp. v. United States,* 431 U.S. 666 (1977).

The federal government's immunity from liability for injuries sustained by servicemen while on active duty in the armed forces was established in *Feres v. United States,* 340 U.S. 135 (1950). In *Stencel Aero Eng. Corp. v. United States,* 431 U.S. 666 (1977), the Supreme Court held that the government was also immune from a cross-claim for indemnification brought by a manufacturer of a defective product who was sued by an injured serviceman. *Stencel* gave no indication, however, that recovery by the serviceman against the manufacturer would interfere with the government's immunity. In fact, the Court recognized that most military contracts already reflect the manufacturer's liability costs to some extent. *Stencel,* supra, 431 U.S. 672 n.8. Extending governmental immunity to these manufacturers now results in a windfall to them at the expense of the government and injured servicemen.

The Third Circuit Opinion in this case is a departure from and is in conflict with the above referenced case law

and the implications of *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666 (1977).

POINT III. STRICT LIABILITY OF GOVERNMENT CONTRACTORS DOES NOT SIGNIFICANTLY INTERFERE WITH MILITARY DECISIONS.

If the government contractor asserts a claim of government compulsion in the design of a defective product, then the proof required is objective and limited. The Court would not sit in judgment on military policies because the only issue before the Court would be the conduct of the manufacturer. Manufacturer liability, as opposed to government liability directly or by indemnity, does not require judicial review of the appropriateness of military decisions. If the government insisted on buying an unsafe product as in the case of *Sanner v. Ford Motor Co.,* 144 N.J. Super. 1, 364 A.2d 43 (1976), *aff'd,* 1154 N.J. Super. 407, 381 A.2d 805 (1977), *cert. denied* 75 N.J. 616, 384 A.2d 846 (1978), then the contractor would be entitled to immunity. There would be no need for the Court to determine whether the military's procurement decisions were reasonable. The only issue would be whether the conduct of the manufacturer was tortious.

POINT IV. GOVERNMENT APPROVAL OF A PRODUCT'S DESIGN DOES NOT IMPLY APPROVAL OF DEFECTS IN THE DESIGN UNLESS THE GOVERNMENT WAS SPECIFICALLY MADE AWARE OF THE DEFECTS OR UNLESS IT WOULD NOT HAVE ACTED DIFFERENTLY IF IT HAD BEEN MADE AWARE.

As indicated in *Sanner v. Ford Motor Co.*, supra and *Boeing Airplane Co. v. Brown*, supra, government approval of a manufacturer's design does not imply approval of design defects unless the government was specifically made aware of the defect. In the present case, the District Court found that the government knew as much as or more than Boeing about the hazards of the product. This was the third prong of the "*Agent Orange*" test which the Third Circuit described as a "duty to warn, so that military procurement decisions are made on the basis of readily available information" (32A). This duty to warn, however, does not encourage contractors to invest resources in developing safer designs. Government contractors can avoid liability for defective products by minimizing research and limiting their expertise. Judge Weinstein in the most recent opinion filed in the "*Agent Orange*" litigation has suggested modifying the standard of liability to reflect this concern.

> A plaintiff would be required to prove, along with other elements of his cause of action, that the hazards to him that accompanied use of [the product] were, or reasonably should have been known, to the Defendant. The burden would then shift to each individual defendant to prove (1) that the government knew as much as or more than that defendant knew or reasonably should have known about the dangers of [the product] or (2) even if the government had had as much

> knowledge as that defendant should have had, it would have ordered production of [the product] in any event and would not have taken steps to reduce or eliminate the hazard.
>
> The 'knew or reasonably should have known' standard is meant to ensure that, at least in the case of a highly technical product with which a manufacturer has had years of experience and which allegedly caused damage unprecedented in its magnitude, a defendant is not 'encourag[ed] to know as little as possible about the dangers of [its] product[ ].' Note, Liability of a Manufacturer for Products Defectively Designed by the Government, 23 B.C.L. Rev. 1025, 1078-79 (1982).

In Re "Agent Orange" Product Liability Litigation, 597 F. Supp. 740 (E.D.N.Y. 1984).

To demonstrate that the government recognized the hazards associated with a product does not establish that the government approved of its defects or knew as much about the hazards as the contractor reasonably should have known. In the case at bar, Boeing did not establish that the Navy's approval of the specifications for the helicopter was intended to be an approval of any defects in the design of the helicopter. Nor did Boeing establish that the Navy knew as much as or more than Boeing *should* have known. Therefore, the case at bar should be remanded to the District Court on the issue of whether the defects in the helicopter were or reasonably should have been known to Boeing. If it is found that Boeing knew or should have known, then Boeing would be liable unless it could show either that the Navy also knew of the defects or that the Navy would not have acted any differently even if it had known.

CONCLUSION

The decision in this case sets forth a disturbing new and novel doctrine of immunity for government contractors which is contrary to pre-existing cases and the implications of a Supreme Court case. The decision in this case is important because it affects a large number of pending and prospective cases involving the liability of government contractors for design defects in equipment and products purchased by the military. It is respectfully submitted that a writ of certiorari should be granted.

Dated: May 17, 1985.

Respectfully submitted,

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No. _____

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SPIROS KOUTSOUBOS, Administrator of the Estate of James Koutsoubos	:	CIVIL ACTION
v.		FILED DEC 22 1982
BOEING VERTOL, DIVISION OF THE BOEING COMPANY AND THE BOEING COMPANY	:	NO. 81-1090

OPINION

POLLAK, J., DECEMBER 22, 1982

On the evening of March 21, 1979, James Koutsoubos was one of three Navy crewmen who, with two Navy pilots, were assigned to a helicopter training flight off the Florida coast. The training flight was a simulated rescue in which the helicopter was to find and then hover over a floating smoke flare guiding the rescuers to the putative accident victim. The helicopter made several approaches to the flare; on the fourth approach, the helicopter hit the water. It turned over and then floated upside down for several minutes. Koutsoubos and his two fellow crewmen were killed.

Plaintiff, Koutsoubos' father, brought this action under the Death on the High Seas Act, 46 U.S.C. §§ 761-768, to recover damages for his son's death. Defendants Boeing Vertol and the Boeing Company manufactured the helicopter and supplied it to the Navy pursuant to a contract between the Navy and the Boeing Company. Proceeding on a theory of strict liability, plaintiff alleges that the helicopter was defective: "unsafe, unairworthy

and dangerously unfit for its intended use." Complaint ¶ 8(a).

Defendants have moved for summary judgment, relying on the "government contract defense," which, so defendants contend, shields government contractors from liability to third parties for design defects in products supplied to government specifications. Plaintiff, contending that the defense is inapplicable in a product liability setting, asks that the defense be stricken and that summary judgment be denied.

I.

The Supreme Court first recognized the government contract defense in *Yearsley v. Ross Construction Co.*, 309 U.S. 18 (1940). In *Yearsley*, the Court ruled that the defendant, a company that performed work under a contract with the federal government, was not liable for injury to private property resulting from its work improving navigation of the Missouri river: "[I]f this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will." *Id.* at 20-21. Subsequently, state and federal courts have used the *Yearsley* rationale to shield government contractors from liability when they complied with government specifications.[1]

Plaintiff challenges the applicability of *Yearsley* and the government contract defense in this case. Because plaintiff's negligence claims, *see* 28 U.S.C. § 2680(a), and strict liability claims, *see Laird v. Nelms*, 406 U.S. 797 (1972), against the government would be barred by

---

[1] *See Myers v. United States*, 323 F.2d 580, 583 (9th Cir. 1963); *Green v. ICI America, Inc.*, 362 F. Supp. 1263, 1266 (E.D. Tenn. 1973); *Dolphin Gardens, Inc. v. United States*, 243 F. Supp. 824, 827 (D. Conn. 1965); *Valley Forge Gardens v. Morrissey, Inc.*, 385 Pa. 477, 123 A.2d 888 (1956).

sovereign immunity, he argues that "fundamental fairness" requires permitting him to assert those claims against defendant. The cases, however, explain why this argument must be rejected. "First, tort liability principles properly seek to impose liability on the wrongdoer whose act or omission caused the injury, not on the otherwise innocent contractor whose only role in causing the injury was the proper performance of a plan supplied by the government. . . . Before any societal benefit can be derived from the deterrent effects of tort liability, however, the party in a position to correct the tortious act or omission must be held accountable for the damages caused and thus motivated to prevent future torts." *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762, 793-94 (E.D.N.Y. 1980). Second, "[t]o impose liability on the contractor . . . [when the government is immune from suit] would render the Government's immunity . . . meaningless, for if the contractor was held liable, contract prices to the Government would be increased to cover the contractor's risk of loss from possible harmful effects of complying with decisions of executive officers authorized to make policy judgments." *Dolphin Gardens, Inc. v. United States*, 243 F. Supp. 824, 827 (D. Conn. 1965).[2]

[2] The cases chiefly relied on by plaintiff as rejecting the government contract defense are inapposite: *See Foster v. Day & Zimmerman, Inc.*, 502 F.2d 867, 874 & n.5 (8th Cir. 1974) (plaintiff's claim was "based on proof of the defendants furnishing a defective product"; the specifications of the government contract "did not call for the defendants to assemble a defectively made grenade"); *Whittaker v. Harvell-Kilgore Corporation*, 418 F.2d 1010, 1012-15 (5th Cir. 1969) (government contract required defendant to carry liability insurance and provided that the government would indemnify it for any losses because of injuries or deaths); *Merritt, Chapman & Scott Corp. v. Atkinson Co.*, 295 F.2d 14 (9th Cir. 1961) (government contract defense does not protect a contractor when the contract leaves the details of construction and maintenance entirely in the constractor's hands and when none of the acts charged as negligent is required by the government contract). *See also Powell v. United States Cartridge Co.*, 339 U.S. 497 (1950) (employees of contractor operating a munitions plant owned by the United States not exempt as government employees from the minimum wage and maximum hour provisions of the Fair Labor Standards Act).

In an opinion recently handed down in the context of the "agent orange" product liability litigation now pending in the Eastern District of New York, Judge George C. Pratt has discussed the government contract defense and set forth the elements that a defendant must prove in order to prevail. *See In re "Agent Orange" Product Liability Litigation*, 534 F. Supp. 1046 (E.D.N.Y. 1982). In essence, the defense shields a manufacturer from liability if the product causing the injury complied strictly with government contract specifications concerning design. Accordingly, Judge Pratt ruled that the suppliers of agent orange, who asserted the government contract defense in law suits initiated by Vietnam veterans and members of their families, would have to prove:

> 1. That the government established the specifications for "Agent Orange";
>
> 2. That the "Agent Orange" manufactured by the defendant met the government's specifications in all material respects; and
>
> 3. That the government knew as much as or more than the defendant about the hazards to people that accompanied use of "Agent Orange."

534 F. Supp. at 1055. The burden would be on a defendant to prove these three elements, in addition to establishing that it had one or more contracts with the government under which the particular product that caused the injury was supplied.

The first element would demand proof that the government established the design and specific characteristics of the product. If, however, the contract "set forth merely a 'performance specification,' as opposed to a specified product, then the government contract defense would be far more restricted. . . ." *Id.* at 1056.

The second element would require comparison between the government's specifications and the characteristics of the product. If methods of manufacture were specified, they would be examined as well. "Failure of a defendant to conform to the specifications would defeat the defense only if the discrepancy between specifications and product was a material one. . . ." *Id.* at 1057.

With respect to the third element, which he labelled a "central question" in the agent orange context, Judge Pratt said:

> A defendant can be insulated from liability by the government contract defense only if in addition to showing compliance with specifications established by the government, it can show that it was not aware of hazard-causing deficiencies in the specifications as to the design or method of manufacture, deficiencies which, if known to the government, might have altered the government's decisions. . . .

Id. If a defendant has knowledge of such deficiencies, but the government has equal or greater knowledge, the defendant can still be shielded from liability as long as the product was produced "pursuant to and in compliance with the contract specifications." *Id.*

II.

I am persuaded by the reasoning set forth by Judge Pratt in *In re "Agent Orange" Product Liability Litigation*, 534 F. Supp. 1046 (E.D.N.Y. 1982), and the earlier opinions in that litigation,[3] that the government contract defense is viable and is applicable in this case. Accordingly,

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[3] *See In re "Agent Orange" Product Liability Litigation*, 91 F.R.D. 618 (E.D.N.Y. 1981); *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762 (E.D.N.Y. 1980).

defendants here have the burden of proving the three elements of this affirmative defense as described by the court in *Agent Orange,* 534 F. Supp. at 1055.

First, therefore, defendants must show that the government established the specifications for the helicopter. "[A]ll that is necessary on this element of the defense is for defendant to prove that the product it supplied was a particular product specified by the government." 534 F. Supp. at 1056. An affidavit submitted by Robert Tingley, senior contract administrator for Boeing Vertol ("Affidavit"), and its supporting exhibits provide sufficient proof of this element of the defense. The contract between defendants and the Navy required defendants to furnish 85 Model CH-46A helicopters, including helicopter number 152510, which crashed in March 1979 while carrying plaintiff's son. *See* Tingley Affidavit ¶ 3; Exhibits A, B, & C.

Second, defendants must show that the helicopter met the government's specifications in all material respects. This element of the defense calls for a comparison between the government's specifications for the helicopter with the characteristics and quality of the product supplied. Failure to conform to the specifications would defeat the defense only if the discrepancy is a material one. 534 F. Supp. at 1057.

"Material" specifications in the context of this action relate to those aspects of the helicopter's design alleged by plaintiff to be defective. Although plaintiff's complaint is framed in several counts, its heart is paragraph eight. In addition to the general allegation that the helicopter was "unsafe, unairworthy and unfit for its intended use," plaintiff in paragraph eight asserts several specific defects: inadequate inspection and testing; failure to warn of defective design; failure to design with an easy means of escape or egress for crew members in the event of a crash into water; and failure to design with adequate safety features.

The exhibits submitted in support of the Tingley Affidavit show a very long list of general and detailed specifications established by the contract for this helicopter. According to the Affidavit, the general and detail specifications were established by the Navy. In addition, the Affidavit declares that the Navy established safety features, testing requirements, emergency exit marking requirements, and interior lighting requirements. In short, "[e]very feature of the CH-46A, including its water landing and flotation capability and emergency egress and lighting, was tested and inspected to Navy requirements." Affidavit ¶ 11. Finally, "[o]n March 3, 1966, after satisfying itself that Boeing had furnished an aircraft which met all requirements of the Contract, the Navy accepted Helicopter 152510." *Id.* ¶ 12.

A closer look at the specifications themselves shows that the Navy chose the "material" design features for this helicopter; that is, the Navy established the specifications crucial to plaintiff's allegations of defective design.[4] Inspection by the Navy revealed that these specifications had been satisfied.[5]

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[4] First, the specifications concerning flotation and water landing capability show that the Navy chose a design permitting the helicopter to land on water in an emergency and to float for two hours "in sea state two conditions" with the doors and hatches closed. *See* Exhibit C ¶ 3.19.4.8; Exhibit B ¶ 3.9. Second, the contract specifically provides for six emergency exits, their locations, and the markings to identify them. Exhibit B ¶ 3.7.1.7; Exhibit C ¶ 3.7.1.7.1; Exhibit D; Exhibit E. Third, the contract specified interior lighting requirements. *See* Exhibit E. Fourth, the contract provided for testing and inspection by the Navy prior to its acceptance of the aircraft. It designates an inspector to "conduct physical inspection at the place of manufacture, perform tests and accept or reject the supplies or services being procured in accordance with the terms of this contract." Exhibit A, last page at ¶ I. The contract specified the tests and inspections to be performed. Exhibit A at 4, Items 2 & 3; *Id.* at 28, Section EE; *Id.* at 29, Section FF. As noted above, every feature of the CH-46A was inspected and tested to Navy requirements. Affidavit ¶ 11. The Navy accepted Helicopter 152510 on March 3, 1966. *Id.* at ¶ 12.

[5] *See supra* note 4.

The complaint also alleges manufacturing defects and a failure to warn the decedent of the hazards associated with the helicopter; however, as defendants note in their brief, plaintiff's answers to interrogatories show that these additional allegations are merely repetitive of plaintiff's assertions concerning design defects.[6]

The third element of the defense, as set forth by the Court in *Agent Orange,* 534 F. Supp. at 1055, is that "the government knew as much as or more than the defendant about the hazards" of the product. Under this element of the defense it is appropriate to address plaintiff's argument that the government contract defense does not apply in a situation where the government consulted with the contractor in establishing the specifications for the product. As Judge Pratt noted in *Agent Orange,* however, evidence of defendant participation in preparation of the specifications could not defeat the government contract defense, although such evidence might be "relevant in establishing the relative degrees of knowledge as between the government and the defendants." 534 F. Supp. at 1056.[7]

In the submissions made thus far, defendants have not met their burden of proving that the government's knowledge about the hazards associated with the helicopter was equal to or greater than theirs. Accordingly, defendants must show that they were "not aware of hazard-causing deficiencies in the specifications as to the design or method of manufacture, deficiencies which, if

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[6] E.g., plaintiff stated that the manufacture of the helicopter "failed to incorporate design features to provide for" various safety features, *see* Plaintiff's Second Supplemental Answers to First Set of Interrogatories of defendants at 35(b), and that the danger of which defendants failed to warn was that the aircraft "had not been properly designed, manufactured, assembled and tested as per Answers No. 35 above." *Id.* at 36(b).

[7] Plantiff concedes that the Navy approved any suggestions defendants made and also approved the specifications written into the contract.

known to the government, might have altered the government's decisions as to whether and how to use the [product]." 534 F. Supp. at 1057. If defendants are able to show at trial that the government knew as much as they did about the hazards associated with the design of the CH-46A, they will be protected from liability by the government contract defense.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SPIROS KOUTSOUBOS, Administrator of the Estate of James Koutsoubos	:	CIVIL ACTION
v.		
BOEING VERTOL, DIVISION OF THE BOEING COMPANY AND THE BOEING COMPANY	:	NO. 81-1090

ORDER

For the reasons set forth in the accompanying opinion, it is hereby ORDERED that

1. Defendants' motion for summary judgment is DENIED, but partial summary judgment is GRANTED with respect to the first two elements of the government contract defense.

2. Plaintiff's motion to dismiss the defendants' fourth separate defense is DENIED.

/s/ Louis H. Pollak
POLLAK, J.

DECEMBER 22, 1982

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SPIROS KOUTSOUBOS, Administrator of the Estate of JAMES KOUTSOUBOS,	:	CIVIL ACTION
vs.	:	
BOEING VERTOL, Division of THE BOEING COMPANY and THE BOEING COMPANY	:	NO. 81-1090

Philadelphia, Pennsylvania

February 15, 1984

BEFORE: HONORABLE LOUIS H. POLLAK, J.

BENCH OPINION

DAVID S. EHRLICH
Official Court Reporter
215 925-2391

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for Defendants

(Court reconvened at 1:47 p.m.)

THE COURT: Please sit down, won't you.

First, I am granting the Motion to Amend the Complaint, so the Proposed Amended Complaint will be taken as the Complaint that is before us, with the understanding which was made clear between counsel that of course what has been determined on summary judgment thus far is applicable to the extent that it withstands scrutiny today to the issues as framed by the Amended Complaint. In short, the understanding is that the Amended Complaint is merely a more precise restatement of the claims made in the original complaint.

Now, plaintiff has asked me to reconsider the first part of my decision accompanying my Opinion of December 22, 1982, which granted partial summary judgment on the first two elements of the government contract defense. To be precise, it is Mr. Koutsoubos' contention that I was in error in concluding that the Navy was responsible for the specifications for the H-46 within the definitions of responsibility that pertain to the government contract defense. And, in moving to reconsider, moving to have me reconsider that determination, plaintiff has relied particularly on the Weiland and Weller depositions, and particular identified pages of those depositions.

The thrust of the Motion for Reconsideration is that those depositions demonstrate that Boeing played a major role in shaping the specifications.

The portion of my Opinion of December 22, 1982, that is in question is the portion running from pages 6 through 9, until the top of page 10 of the Opinion, and most particularly including footnote 4 on page 9. That footnote documents a recital in the Opinion which really is recapitulatory of what I crucially determined that quote — The Navy established the specifications crucial to plaintiff's allegations of defective design, - close quotes.

I accept, and indeed I believe it was implicit if not explicit in my Opinion on partial summary judgment, that Boeing played a major role in shaping the specifications governing the H-46, but the crucial question I take it is whether the record demonstrates that it was the Navy that set or approved the specifications, and that is exactly what I think we have here, that it was in every instance the Navy which finally approved the specifications which were arrived at.

Not infrequently, those specifications were proposed by Boeing and those proposals would then initiate sometimes an extended period of discussion back and

forth, and not infrequently modification. But, ultimately it was the Navy's decision.

Now to illustrate my understanding of the governing principle of law, I quote from what the Ninth Circuit had to say in *McKay vs. Rockwell International Corporation*, 704 F.2d 444 at 453, a case in which the Court of Appeals concluded that it was not possible on the basis of that record to determine whether summary judgment was in order on that issue:

> "The present record, however, does not permit us to say with assurance that the United States set or approved reasonably-detailed specifications for the HS-1A system. On the one hand Rockwell alleges that the United States was deeply involved in the process of designing and approving the system. On the other hand, plaintiffs appellants contend that the United States did a little more than send Rockwell a letter asking them to come up with a new ejection system and agreed to purchase Rockwell's completed design. We remand these cases to the District Court to determine whether the United States set or approved reasonably-detailed specifications for the HS-1A ejection system. If the District Court finds that the involvement of the United States was limited in the manner in which the plaintiffs appellants assert, that is, if the United States neither set specifications for the system, other than general outlines of what type of system it required, nor approved Rockwell's final reasonably-detailed specifications by examining and agreeing to a detailed description of the workings of the system, then Rockwell is subject to strict liability under the rules set forth in § 402(a). We note that Rockwell, the supplier, has the burden of proving by a preponderance of the evidence that the United States established or approved reasonably-precise specifications for the ejection system."

The record here I concluded on the Motion for Summary Judgment established beyond a peradventure of a doubt that this was an instance in which the United States approved — the United States, that is, through the Navy, approved the reasonably-detailed, indeed very detailed specifications.

I have reviewed that decision again in the light of the portions of the Weller and Weiland depositions relied upon by plaintiff. I find absolutely no reason to change my view of the matter.

Those depositions seem to be consistent with Mr. Weiland's testimony at this hearing, a hearing which was addressed not to the first element, but the third element of the government contract defense had to say about the negotiating relationship between Boeing and the Navy. A continuous back-and-forth, but with the Navy always, expectedly and properly, having the responsibility for and exercising responsibility for making final decisions as to specifications. So, I deny the Motion to Reconsider.

We come finally to the issue that is the basis for the hearing conducted yesterday and today. The issue has been to pursue that aspect of the motion for summary judgment which I concluded in December of 1982 defendant Boeing was not entitled to on the record as it there stood. That relates to the third element of the government contract defense and goes to the question of the relative knowledge of the defendant manufacturer and the government with respect to the hazards that are allegedly the critical hazards in producing the injuries complained of in the underlying litigation.

Now, it has been and it continues to be defendant Boeing's position that there is no such issue in a lawsuit in which the product complained about is — well, if I may put it illustratively, a helicopter as distinct from Agent Orange. The thought, as I understand it, is that Agent

Orange, the chemical compound at issue in the extended litigation before Judge Pratt in the Eastern District of New York which has generated a large share of the law in this field, 534 F. Supp. 1046 is a recent citation, that Agent Orange is a product secret in nature, or at least not widely known in its composition and application and implication, that in the nature of things one is there dealing with a product where expectedly the manufacturer is privy to a whole array of information that the government, like any other consumer, might be expected to know little or nothing about. Governments are not in the business of manufacturing or until recently using radical pesticides or comparable materials, but that governments are in the business, if not of manufacturing — although they might even be that, but certainly of using military aircraft, and that basically the design and construction and hazards of aircraft are matters of general information which governments can be expected to know as much as or more about, and indeed the general world community can be expected to know as much as or more about than any particular manufacturer.

So, it is Boeing's submission that there is no such issue in the case, properly understood, and that if there is such an issue it is unfair to impose on the defendant the burden of proving the absence, the relative absence of greater knowledge on the part of the manufacturer than the government with respect to the critical hazards, but rather that the burden should be upon the plaintiff who is the person asserting or the person or enterprise asserting the existence of hazards who should build upon that burden and responsibility of identifying not only the hazards, but the knowledge surrounding those hazards.

I outline Boeing's position on this matter, perhaps not adequately to do the position justice, because I think it owing to the record to explain the position as I understand it at the same time that I state that I adhere to my view that the issue is in this case as it is in the Agent Orange

case, and that the distinctions which Boeing draws between a product such as the one involved here and the product such as the one involved in the Agent Orange litigation, the distinctions are ones which go to the weight of the arguments to be addressed in reviewing the proof. They are not distinctions which go doctrinally to remove this issue from legal controversy.

What is the nature of the third ingredient of the government contract defense? Here I will quote from my own previous Opinion because this represents the doctrinal framework within which I think the matter falls:

> "The third element of the defense as set forth by the Court in Agent Orange, 534 F. Supp. at 1055, is that 'the government knew as much as or more than the defendant about the hazards'

but rather that the burden should be upon the plaintiff who is the person asserting or the person or enterprise asserting the existence of hazards who should build upon that burden and responsibility of identifying not only the hazards, but the knowledge surrounding those hazards.

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> "The third element of the defense as set forth by the Court in Agent Orange, 534 F. Supp. at 1055, is that 'the government knew as much as or more than the defendant about the hazards' of the product. Under this element of the defense, it is appropriate to address plaintiff's argument that the government contract defense does not apply in a situation where the government consulted with the contractor in establishing the specifications for the product.
>
> "As Judge Pratt noted in Agent Orange, however, evidence of defendant participation in preparation of the specifications could not defeat the government contract defense, although such evidence might be 'relevant in establishing the relative degrees of knowledge as between the government and the defendants.' 534 F. Supp. at 1056.
>
> "In the submissions made thus far, defendants have not met their burden of proving that the government's knowledge about the hazards associated with the helicopter was equal to or greater than theirs. Accordingly, defendants must show that they were 'not aware of hazard-causing deficiencies in the specifications as to the design or method of manufacture, deficiencies which, if known to the government, might have altered the government's decisions as to whether and how to use the [product].' 534 F. Supp. at 1057.
>
> "If the defendants are able to show at trial that the government knew as much as they did about the hazards associated with the design of the CH-46A, they will be protected from liability by the government contract defense."

This is that trial. The CH-46A, or H-46 as it also has come to be called, is a helicopter produced for Navy use by Boeing pursuant to a series of contracts begun in 1960 and re-negotiated and renewed periodically thereafter.

The H-46 is, in its outer appearance, a helicopter that owes a considerable amount to an antecedent helicopter produced for civilian use by Boeing prior to the government procurement program. With that fact in mind, it is Mr. Koutsoubos' strong argument that Boeing, in effect, initiated the design and specification process and has always had what might be called parental knowledge of the total range of hazards associated with a helicopter which was initially, many years before the Navy began to buy them in large number, a Boeing infant. That emphasis, however, is, in my judgment, neutralized to the point of being overcome by the clear testimony of Mr. Weiland that the H-46, while like its ancestor in outward appearance, has changed in almost every element underneath the skin. So that the Navy specifications describe a different aircraft.

Now, the evidence before me has consisted of testimony by four witnesses, two of them Boeing personnel: Mr. Senderoff and Mr. Weiland, both of whom have worked for Boeing and its predecessor for a generation; two are Navy or former Navy personnel: Mrs. Rice who is retired from the Navy, that is, retired from civil employment in the Navy after what would appear to be an admirable career as a safety expert, and Commander VanPelt, who retired from uniformed service in the Navy as a Commander after 20 years of service from 1960 to 1980. Commander VanPelt now works for the TVA. As he acknowledged from the witness stand, he is pro hac vice, an employee in the sense that he came here as a Boeing expert.

In addition to the testimony of these four witnesses, we have a substantial pile of exhibits. Most of these exhibits are studies either by Boeing personnel or by Navy

personnel, of aspects of the problems of survivability that are generated by helicopter crashes over or on the water.

What the testimony and the studies demonstrate to me with extraordinary uniformity is that the Navy has set the specifications for the H-46 after reviewing proposals by Boeing, and has approved revisions of those specifications over the years after considering proposals by Boeing. The setting and the revising of specifications and the administration of the contract relationship between the Navy and Boeing has been a process of almost daily continuity. Indeed, according to Mr. Weiland, it has been a matter of actual daily contact throughout the years, which were 1960 through 1970 in which he, for Boeing, was the project manager for the H-46. He testified that he was on the phone to the Navy every day and that every Wednesday he would be in Washington.

Moreover, it was part of Mr. Weiland's responsibilities as project manager to be in communication with the Navy about any matters affecting the safety of the aircraft which came to Boeing's attention, and the aircraft was one manufactured by Boeing primarily for the Navy but also in limited numbers for certain foreign buyers; I think Sweden and Canada.

Mr. Weiland's testimony makes it plain that key to the relationship between Boeing and its three governmental customers was a constant sharing of information about the operation of the aircraft, and then immediate pooling of any concerns relating to the safety.

The Amended Complaint, which is somewhere not too far away (Pause) — In the Amended Complaint in Paragraph 22 it sets forth the hazards identified by the plaintiff as those which are focal to his care: "Said aircraft was defective and unreasonably dangerous to the user because it was defectively designed and manufactured and was unsafe for its intended uses in that it would invert

upon contact with water, it contained inadequate flotation equipment, it contained an inadequate underwater lighting system and/or it contained inadequate restraints for passengers."

Now, I noted in my Opinion of December 22, 1982, in the footnote to which I have already adverted, that "The Navy established the specifications crucial to plaintiff's allegations of defective design," and in footnote 4 I referred specifically to specifications with respect to flotation. That was the specification which called for a flotation capacity for two hours in a landing, presumably a planned landing "in a sea state 2 condition." The footnotes that they were specifications specifically identifying emergency exits and their placement and markings, that the contract specified specifically the interior lighting requirements, and the contract specified an array of testing and inspection processes by the Navy prior to acceptance of the aircraft. The performance of the inspection and the acceptance processes were detailed by Commander VanPelt whose duty that was on assignment from the Navy at Boeing for some extended period of time.

The record shows that in addition the Navy specifications were express in providing for an emergency lighting system to take hold where a landing was in excess of — pressures in excess of — at forces in excess of 2½ G's, a specification which excluded any emergency lighting system for so-called soft landings of which the landing at issue in this litigation would appear to have been an example.

With respect to the last of the hazards identified in Paragraph 22 of the Amended Complaint: inadequate restraints for passengers, the record makes plain that as that complaint, that aspect of the Complaint may relate to the tragic events which led to the decedent's, the younger Mr. Koutsoubos' death, the restraint to which he was connected was a gunner's belt which was not a Boeing

product, and it was attached to a tie-down ring in the floor of the aircraft which, from Boeing's perspective, had been placed there along with the other rings for anchoring vehicles or pallets of cargo or whatever. In short, with respect to restraints, the decedent was restrained by a set of arrangements of the Navy's own devising that had nothing to do with the product supplied by Boeing, or Boeing's understanding of the uses to which the product was to be put.

What emerges from the testimony and the exhibits taken together is that the continuing relationship between Boeing and the Navy has involved a steady interchange of information about all aspects of the H-46's use, including accident information. But, it is crucial to understanding a resolution of the legal issue now before this Court that the accident information to which Boeing was privy was almost in its entirety information coming from the Navy to Boeing. Representative of this process is the data base for three studies performed by Boeing between 1962 and 1971 for the Navy, under Navy contracts. These are Defendant's Exhibits 2, 4 and 6. These exhibits dealt respectively with feasibility study of escape systems for U.S. Navy helicopters, a 1962 study; a study of helicopter accident data to determine the feasibility of a survival escape system, which was the 1968 study; and Helicopter Escape and Personnel Survival Accident Data Study, that was the 1971 report. In each instance, Boeing, under Navy contract, was reporting to the Navy its, Boeing's, analysis of the accident data in Boeing's possession as that related to the operation and design of the H-46 and many other helicopters in Navy use.

Clearly, these were reports which had implication if the Navy determined to pursue such implication for revision of the design of many types of aircraft, including the H-46, and/or revision of the missions of such aircraft, presuming that aircraft which were in service were to be continued in service.

That Boeing had a great deal of information is plain on this record, but it is also plain that the data which Boeing had, the Navy had. The Navy had it initially and it came to Boeing, sometimes in the quite capsulized bureaucratic form of the Accident Safety Reports, which Mrs. Rice gave testimony about. It was analyzed by Boeing officials, including, for example, Mr. Senderoff, from whom we heard testimony, and then it was returned to the Navy with full analysis.

Under the circumstances, it is clear to me that the Boeing information was Navy information in its substantial entirety; Navy information in its inception and then in its return. So that as between the two, it was the Navy which did not give Boeing, for example, all of its Accident Safety Reports, but merely extrapolated information from them; it was the Navy which was the better informed.

The informed status of the Navy is confirmed by other reports which are Navy reports. I refer here to the report by Mrs. Rice and Commander Grear, which is Defendant's Exhibit 8, "Underwater Escape from Helicopters," a 1972 or '73 report. I also refer to Defendant's Exhibit 10, "The Effectiveness of Escape Hatch Illumination, An Aid to Egress from a Submerged Helicopter"; that was a report of a Naval submarine medical research laboratory. Defendant's Exhibit 11, "Helicopter Underwater Escape Lighting," Dr. Chisim's report of 1976; Defendant's Exhibit 9, "The Naval Air Systems Command Report of 26 June 1975," by Joseph W. Flaig, "Helicopter Flotation and Personnel Safety in Unplanned Water Landings, from fiscal year 1960 through fiscal year 1974."

Flaig's report, to take that as an example, is not a Boeing report, it is a report generated by the Navy itself, and I identify this report particularly because it is one which carries particularly pertinent information with respect to the critical events which had been observed in numbers of H-46 accidents and which were tragically

replicated in the loss at sea of the helicopter in which Mr. Koutsoubos lost his life along with two seamates.

On page 2 of that report, Defendant's Exhibit 9, we are told in Paragraphs 4 and 5:

> "Even helicopters which are designed to float for a modest period of time (minutes, not hours), such as the H-46 with its sealed bottom and aft sponsons, still has a reasonably high incidence of rolling and sinking. Out of 19 'reasonably unplanned landings' in eight years, five vehicles rolled (inverted) and eight sank, all in less than two minutes. Helicopters which do not have significantly different flotation characteristics than those flown over the past 15 years cannot be expected to float inverted. Of the vehicles which might have been expected to float, either upright or inverted, (H-2, H-3, H-46, H-53), 7 of 103 are known to have floated inverted but not necessarily for longer than several seconds."

What we have, in short, is massive information known to the Navy shared fairly regularly by Boeing, and doubtless with other manufacturers. As for example, with respect to lighting, the Navy's information there would have been communicated to firms manufacturing lighting systems, which was not, of course, a primary function of Boeing.

We have Navy personnel, and from time-to-time Navy contractors, such as Boeing, making recommendations for alterations in design and/or in training, but we also have a record in which it is clear that no fundamental changes in the design or equipment of the H-46 in the respects pertinent to this litigation have been made by the Navy in the period from the H-46's initial production pursuant to the contract of 1960, through, so far as I understand the record, today.

The tragic accident that gave rise to this litigation was in 1979. The testimony and exhibits before me showed that every aspect of hazard relating to that accident, the danger of inversion, the limited flotation capacity, the modest impact protection, the absence of devices which would permit the blowing-out of escape hatches, the difficulty of identifying through lights or luminescent outlines, the placement of escape hatches, the surrounding difficulties of disorientation in an inverted helicopter in which water is rushing in in the darkness; the importance of altering the mode of passenger restraints, at least with a view to making the restraints automatically open themselves on contact with water, all of these matters were subjects of studies by the Navy for itself, or by Boeing for the Navy on the basis of information supplied by the Navy to Boeing.

I cannot say on this basis, on the basis of this record, that this is an instance in which the defendant manufacturer had information about the hazards surrounding use of the product that were superior to that of the relevant government agency. On the contrary, I find by the overwhelming preponderance of the evidence that the Navy knew at least as much as, and in most instances considerably more than Boeing did about the relevant problems.

The record is clear that the Navy has persistently been interested in these matters. Why the Navy has not made the significant changes which might, for example by 1979 all the reports that have been in evidence pre-date 1979, have precluded the operation of the helicopter in which Mr. Koutsoubos died and in the fashion which led to his death, a Court cannot responsibly determine, at least on this limited record. It is part of the rationale for the government contract defense that matters which are not intrinsically of judicial competence, most especially those affecting military mission and design, should be outside the judicial province except to the extent absolutely necessary.

It is a fair assumption which the record suggests in some particulars but is cloudy on with respect to others, that the military missions of the Navy's helicopters, including the H-46, were such that significant changes in design, notwithstanding that they would improve safety, could be adopted only at the cost of modifications in mission effectiveness. These are judgments quite sensibly not put in my charge, but they perhaps serve to explain the scenario which is before us.

My limited responsibility is to adjudge whether Boeing has successfully demonstrated by a preponderance of the evidence that the third leg of the government contract defense has been put in place.

I said at the conclusion of my Opinion on December 22, 1982, "If defendants are able to show at trial that the government knew as much as they did about the hazards associated with the design of the CH-46A, they will be protected from liability by the government contract defense."

It is my conclusion that Boeing has made that demonstration. What flows from that is that Boeing, having established the first two legs on summary judgment and having put in place the third leg here at trial, has established a full defense and is entitled to a judgment in its favor.

This is the conclusion that in my judgment the prevailing law requires. The government contract defense is properly invoked in my judgment in a case such as this one brought by a private litigant against one who manufactures equipment for the government where the cause of action is one which arises under the Death On The High Seas Act. This case is in that respect in harmony with the Ninth Circuit's *McKay* case to which I have referred where the defense was held by that Court of Appeals to by proper in that action brought under the same federal statute.

There is matter for regret in coming to the conclusion that there can be no compensation against the contractor for the death of a young man in military service, but it is the law's determination that that is not the place where liability is to be found.

The law reaches that determination as a derivative of the immunity of the government itself from liability in this instance. My point is not to quarrel with the doctrine or its application here, but only to express what I think would be for all of us the citizen hope that the tragedy of the loss of a son which afflicts this plaintiff is not compounded by the loss of any possibility of substantial financial recompense, not that dollars could in any way replace the child.

The scheme of things, of course, is that a person dying in military service is recompensed by the arrangements which Congress makes for such loss of one pursuant to official duty, and one hopes that proper provision is made under Congress' dispositions for the kind of recovery that all of us would wish to see in such an unhappy event.

I don't mean to suggest in making these remarks that the defendant is in some cold sense pursuing an inappropriate relief. Far from it. Boeing is asserting its rights under principles of law enunciated by high courts and it is entitled to do so. I could wish that Boeing had not said in its brief on the trial of this matter in explaining the irrelevance of certain of the claims about insufficient lighting and unavailable escape hatches and so forth, that these were non-significant in this case because Mr. Koutsoubos was a "goner" at the time that the helicopter turned over and fell into the water; that is to say, the moment his head struck something and he lost consciousness or moved to an altered state of consciousness. I am sure that was not intended to be a chilly or callous view of the loss suffered by the plaintiff in this matter.

The sum and substance of my decision is that for the reasons I have enunciated I find that Boeing has established now the third element of the government contract defense. It fills in the missing aspect of that defense since I have determined earlier this afternoon that the Motion for Reconsideration with respect to the first defense should be denied.

Accordingly, I will enter an Order which enters judgment for the defendant and against the plaintiff.

I want to thank counsel for the parties for their presentation of this matter. It took some time getting the case finally to issue, but it did come to issue and was crisply presented at this point, and I hope properly resolved. The Court is in counsel's debt in that respect.

We are in recess.

(COURT RECESSED AT 1:48 P.M.)

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1142

KOUTSOUBOS, SPIROS, Administrator
of the Estate of James Koutsoubos,
Appellant

v.

BOEING VERTOL, DIVISION OF THE
BOEING COMPANY AND THE BOEING COMPANY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 81-1090)

Argued: December 14, 1984
Before: GARTH and HIGGINBOTHAM,
Circuit Judges, and
McCUNE, *District Judge**
(Filed February 27, 1985)

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

This is an appeal from a final judgment of the district court for appellees Boeing Vertol and its parent, The Boeing Company (collectively referred to as "Boeing"), in a suit brought under the Death on the High Seas Act, 46 U.S.C. §§ 761-768 (1982), by appellant Spiros Koutsoubos, administrator of the estate of James Koutsoubos. Because we find no error of fact or law in the district court's conclusion that Boeing had made out the elements of a "government contractor" defense, we will affirm.

I.

Decedent James Koutsoubos was one of three Navy crewmen killed during a training flight off the Florida coast on March 21, 1979, when the helicopter they were aboard hit the water and turned upside down. Appellant filed suit alleging that the helicopter, manufactured by Boeing for the Navy, was unsafe due

case, and that the distinctions which Boeing draws between a product such as the one involved here and the product such as the one involved in the Agent Orange litigation, the distinctions are ones which go to the weight of the arguments to be addressed in reviewing the proof. They are not distinctions which go doctrinally to remove this issue from legal controversy.

What is the nature of the third ingredient of the government contract defense? Here I will quote from my own previous Opinion because this represents the doctrinal framework within which I think the matter falls:

> "The third element of the defense as set forth by the Court in Agent Orange, 534 F. Supp. at 1055, is that 'the government knew as much as or more than the defendant about the hazards'

but rather that the burden should be upon the plaintiff who is the person asserting or the person or enterprise asserting the existence of hazards who should build upon that burden and responsibility of identifying not only the hazards, but the knowledge surrounding those hazards.

I outline Boeing's position on this matter, perhaps not adequately to do the position justice, because I think it owing to the record to explain the position as I understand it at the same time that I state that I adhere to my view that the issue is in this case as it is in the Agent Orange case, and that the distinctions which Boeing draws between a product such as the one involved here and the product such as the one involved in the Agent Orange litigation, the distinctions are ones which go to the weight of the arguments to be addressed in reviewing the proof. They are not distinctions which go doctrinally to remove this issue from legal controversy.

What is the nature of the third ingredient of the government contract defense? Here I will quote from my

own previous Opinion because this represents the doctrinal framework within which I think the matter falls:

> "The third element of the defense as set forth by the Court in Agent Orange, 534 F. Supp. at 1055, is that 'the government knew as much as or more than the defendant about the hazards' of the product. Under this element of the defense, it is appropriate to address plaintiff's argument that the government contract defense does not apply in a situation where the government consulted with the contractor in establishing the specifications for the product.
>
> "As Judge Pratt noted in Agent Orange, however, evidence of defendant participation in preparation of the specifications could not defeat the government contract defense, although such evidence might be 'relevant in establishing the relative degrees of knowledge as between the government and the defendants.' 534 F. Supp. at 1056.
>
> "In the submissions made thus far, defendants have not met their burden of proving that the government's knowledge about the hazards associated with the helicopter was equal to or greater than theirs. Accordingly, defendants must show that they were 'not aware of hazard-causing deficiencies in the specifications as to the design or method of manufacture, deficiencies which, if known to the government, might have altered the government's decisions as to whether and how to use the [product].' 534 F. Supp. at 1057.
>
> "If the defendants are able to show at trial that the government knew as much as they did about the hazards associated with the design of the CH-46A, they will be protected from liability by the government contract defense."

This is that trial. The CH-46A, or H-46 as it also has come to be called, is a helicopter produced for Navy use by Boeing pursuant to a series of contracts begun in 1960 and re-negotiated and renewed periodically thereafter.

The H-46 is, in its outer appearance, a helicopter that owes a considerable amount to an antecedent helicopter produced for civilian use by Boeing prior to the government procurement program. With that fact in mind, it is Mr. Koutsoubos' strong argument that Boeing, in effect, initiated the design and specification process and has always had what might be called parental knowledge of the total range of hazards associated with a helicopter which was initially, many years before the Navy began to buy them in large number, a Boeing infant. That emphasis, however, is, in my judgment, neutralized to the point of being overcome by the clear testimony of Mr. Weiland that the H-46, while like its ancestor in outward appearance, has changed in almost every element underneath the skin. So that the Navy specifications describe a different aircraft.

Now, the evidence before me has consisted of testimony by four witnesses, two of them Boeing personnel: Mr. Senderoff and Mr. Weiland, both of whom have worked for Boeing and its predecessor for a generation; two are Navy or former Navy personnel: Mrs. Rice who is retired from the Navy, that is, retired from civil employment in the Navy after what would appear to be an admirable career as a safety expert, and Commander VanPelt, who retired from uniformed service in the Navy as a Commander after 20 years of service from 1960 to 1980. Commander VanPelt now works for the TVA. As he acknowledged from the witness stand, he is pro hac vice, an employee in the sense that he came here as a Boeing expert.

In addition to the testimony of these four witnesses, we have a substantial pile of exhibits. Most of these exhibits are studies either by Boeing personnel or by Navy

personnel, of aspects of the problems of survivability that are generated by helicopter crashes over or on the water.

What the testimony and the studies demonstrate to me with extraordinary uniformity is that the Navy has set the specifications for the H-46 after reviewing proposals by Boeing, and has approved revisions of those specifications over the years after considering proposals by Boeing. The setting and the revising of specifications and the administration of the contract relationship between the Navy and Boeing has been a process of almost daily continuity. Indeed, according to Mr. Weiland, it has been a matter of actual daily contact throughout the years, which were 1960 through 1970 in which he, for Boeing, was the project manager for the H-46. He testified that he was on the phone to the Navy every day and that every Wednesday he would be in Washington.

Moreover, it was part of Mr. Weiland's responsibilities as project manager to be in communication with the Navy about any matters affecting the safety of the aircraft which came to Boeing's attention, and the aircraft was one manufactured by Boeing primarily for the Navy but also in limited numbers for certain foreign buyers; I think Sweden and Canada.

Mr. Weiland's testimony makes it plain that key to the relationship between Boeing and its three governmental customers was a constant sharing of information about the operation of the aircraft, and then immediate pooling of any concerns relating to the safety.

The Amended Complaint, which is somewhere not too far away (Pause) — In the Amended Complaint in Paragraph 22 it sets forth the hazards identified by the plaintiff as those which are focal to his care: "Said aircraft was defective and unreasonably dangerous to the user because it was defectively designed and manufactured and was unsafe for its intended uses in that it would invert

upon contact with water, it contained inadequate flotation equipment, it contained an inadequate underwater lighting system and/or it contained inadequate restraints for passengers."

Now, I noted in my Opinion of December 22, 1982, in the footnote to which I have already adverted, that "The Navy established the specifications crucial to plaintiff's allegations of defective design," and in footnote 4 I referred specifically to specifications with respect to flotation. That was the specification which called for a flotation capacity for two hours in a landing, presumably a planned landing "in a sea state 2 condition." The footnotes that they were specifications specifically identifying emergency exits and their placement and markings, that the contract specified specifically the interior lighting requirements, and the contract specified an array of testing and inspection processes by the Navy prior to acceptance of the aircraft. The performance of the inspection and the acceptance processes were detailed by Commander VanPelt whose duty that was on assignment from the Navy at Boeing for some extended period of time.

The record shows that in addition the Navy specifications were express in providing for an emergency lighting system to take hold where a landing was in excess of — pressures in excess of — at forces in excess of 2½ G's, a specification which excluded any emergency lighting system for so-called soft landings of which the landing at issue in this litigation would appear to have been an example.

With respect to the last of the hazards identified in Paragraph 22 of the Amended Complaint: inadequate restraints for passengers, the record makes plain that as that complaint, that aspect of the Complaint may relate to the tragic events which led to the decedent's, the younger Mr. Koutsoubos' death, the restraint to which he was connected was a gunner's belt which was not a Boeing

product, and it was attached to a tie-down ring in the floor of the aircraft which, from Boeing's perspective, had been placed there along with the other rings for anchoring vehicles or pallets of cargo or whatever. In short, with respect to restraints, the decedent was restrained by a set of arrangements of the Navy's own devising that had nothing to do with the product supplied by Boeing, or Boeing's understanding of the uses to which the product was to be put.

What emerges from the testimony and the exhibits taken together is that the continuing relationship between Boeing and the Navy has involved a steady interchange of information about all aspects of the H-46's use, including accident information. But, it is crucial to understanding a resolution of the legal issue now before this Court that the accident information to which Boeing was privy was almost in its entirety information coming from the Navy to Boeing. Representative of this process is the data base for three studies performed by Boeing between 1962 and 1971 for the Navy, under Navy contracts. These are Defendant's Exhibits 2, 4 and 6. These exhibits dealt respectively with feasibility study of escape systems for U.S. Navy helicopters, a 1962 study; a study of helicopter accident data to determine the feasibility of a survival escape system, which was the 1968 study; and Helicopter Escape and Personnel Survival Accident Data Study, that was the 1971 report. In each instance, Boeing, under Navy contract, was reporting to the Navy its, Boeing's, analysis of the accident data in Boeing's possession as that related to the operation and design of the H-46 and many other helicopters in Navy use.

Clearly, these were reports which had implication if the Navy determined to pursue such implication for revision of the design of many types of aircraft, including the H-46, and/or revision of the missions of such aircraft, presuming that aircraft which were in service were to be continued in service.

That Boeing had a great deal of information is plain on this record, but it is also plain that the data which Boeing had, the Navy had. The Navy had it initially and it came to Boeing, sometimes in the quite capsulized bureaucratic form of the Accident Safety Reports, which Mrs. Rice gave testimony about. It was analyzed by Boeing officials, including, for example, Mr. Senderoff, from whom we heard testimony, and then it was returned to the Navy with full analysis.

Under the circumstances, it is clear to me that the Boeing information was Navy information in its substantial entirety; Navy information in its inception and then in its return. So that as between the two, it was the Navy which did not give Boeing, for example, all of its Accident Safety Reports, but merely extrapolated information from them; it was the Navy which was the better informed.

The informed status of the Navy is confirmed by other reports which are Navy reports. I refer here to the report by Mrs. Rice and Commander Grear, which is Defendant's Exhibit 8, "Underwater Escape from Helicopters," a 1972 or '73 report. I also refer to Defendant's Exhibit 10, "The Effectiveness of Escape Hatch Illumination, An Aid to Egress from a Submerged Helicopter"; that was a report of a Naval submarine medical research laboratory. Defendant's Exhibit 11, "Helicopter Underwater Escape Lighting," Dr. Chisim's report of 1976; Defendant's Exhibit 9, "The Naval Air Systems Command Report of 26 June 1975," by Joseph W. Flaig, "Helicopter Flotation and Personnel Safety in Unplanned Water Landings, from fiscal year 1960 through fiscal year 1974."

Flaig's report, to take that as an example, is not a Boeing report, it is a report generated by the Navy itself, and I identify this report particularly because it is one which carries particularly pertinent information with respect to the critical events which had been observed in numbers of H-46 accidents and which were tragically

replicated in the loss at sea of the helicopter in which Mr. Koutsoubos lost his life along with two seamates.

On page 2 of that report, Defendant's Exhibit 9, we are told in Paragraphs 4 and 5:

> "Even helicopters which are designed to float for a modest period of time (minutes, not hours), such as the H-46 with its sealed bottom and aft sponsons, still has a reasonably high incidence of rolling and sinking. Out of 19 'reasonably unplanned landings' in eight years, five vehicles rolled (inverted) and eight sank, all in less than two minutes. Helicopters which do not have significantly different flotation characteristics than those flown over the past 15 years cannot be expected to float inverted. Of the vehicles which might have been expected to float, either upright or inverted, (H-2, H-3, H-46, H-53), 7 of 103 are known to have floated inverted but not necessarily for longer than several seconds."

What we have, in short, is massive information known to the Navy shared fairly regularly by Boeing, and doubtless with other manufacturers. As for example, with respect to lighting, the Navy's information there would have been communicated to firms manufacturing lighting systems, which was not, of course, a primary function of Boeing.

We have Navy personnel, and from time-to-time Navy contractors, such as Boeing, making recommendations for alterations in design and/or in training, but we also have a record in which it is clear that no fundamental changes in the design or equipment of the H-46 in the respects pertinent to this litigation have been made by the Navy in the period from the H-46's initial production pursuant to the contract of 1960, through, so far as I understand the record, today.

The tragic accident that gave rise to this litigation was in 1979. The testimony and exhibits before me showed that every aspect of hazard relating to that accident, the danger of inversion, the limited flotation capacity, the modest impact protection, the absence of devices which would permit the blowing-out of escape hatches, the difficulty of identifying through lights or luminescent outlines, the placement of escape hatches, the surrounding difficulties of disorientation in an inverted helicopter in which water is rushing in in the darkness; the importance of altering the mode of passenger restraints, at least with a view to making the restraints automatically open themselves on contact with water, all of these matters were subjects of studies by the Navy for itself, or by Boeing for the Navy on the basis of information supplied by the Navy to Boeing.

I cannot say on this basis, on the basis of this record, that this is an instance in which the defendant manufacturer had information about the hazards surrounding use of the product that were superior to that of the relevant government agency. On the contrary, I find by the overwhelming preponderance of the evidence that the Navy knew at least as much as, and in most instances considerably more than Boeing did about the relevant problems.

The record is clear that the Navy has persistently been interested in these matters. Why the Navy has not made the significant changes which might, for example by 1979 all the reports that have been in evidence pre-date 1979, have precluded the operation of the helicopter in which Mr. Koutsoubos died and in the fashion which led to his death, a Court cannot responsibly determine, at least on this limited record. It is part of the rationale for the government contract defense that matters which are not intrinsically of judicial competence, most especially those affecting military mission and design, should be outside the judicial province except to the extent absolutely necessary.

It is a fair assumption which the record suggests in some particulars but is cloudy on with respect to others, that the military missions of the Navy's helicopters, including the H-46, were such that significant changes in design, notwithstanding that they would improve safety, could be adopted only at the cost of modifications in mission effectiveness. These are judgments quite sensibly not put in my charge, but they perhaps serve to explain the scenario which is before us.

My limited responsibility is to adjudge whether Boeing has successfully demonstrated by a preponderance of the evidence that the third leg of the government contract defense has been put in place.

I said at the conclusion of my Opinion on December 22, 1982, "If defendants are able to show at trial that the government knew as much as they did about the hazards associated with the design of the CH-46A, they will be protected from liability by the government contract defense."

It is my conclusion that Boeing has made that demonstration. What flows from that is that Boeing, having established the first two legs on summary judgment and having put in place the third leg here at trial, has established a full defense and is entitled to a judgment in its favor.

This is the conclusion that in my judgment the prevailing law requires. The government contract defense is properly invoked in my judgment in a case such as this one brought by a private litigant against one who manufactures equipment for the government where the cause of action is one which arises under the Death On The High Seas Act. This case is in that respect in harmony with the Ninth Circuit's *McKay* case to which I have referred where the defense was held by that Court of Appeals to by proper in that action brought under the same federal statute.

There is matter for regret in coming to the conclusion that there can be no compensation against the contractor for the death of a young man in military service, but it is the law's determination that that is not the place where liability is to be found.

The law reaches that determination as a derivative of the immunity of the government itself from liability in this instance. My point is not to quarrel with the doctrine or its application here, but only to express what I think would be for all of us the citizen hope that the tragedy of the loss of a son which afflicts this plaintiff is not compounded by the loss of any possibility of substantial financial recompense, not that dollars could in any way replace the child.

The scheme of things, of course, is that a person dying in military service is recompensed by the arrangements which Congress makes for such loss of one pursuant to official duty, and one hopes that proper provision is made under Congress' dispositions for the kind of recovery that all of us would wish to see in such an unhappy event.

I don't mean to suggest in making these remarks that the defendant is in some cold sense pursuing an inappropriate relief. Far from it. Boeing is asserting its rights under principles of law enunciated by high courts and it is entitled to do so. I could wish that Boeing had not said in its brief on the trial of this matter in explaining the irrelevance of certain of the claims about insufficient lighting and unavailable escape hatches and so forth, that these were non-significant in this case because Mr. Koutsoubos was a "goner" at the time that the helicopter turned over and fell into the water; that is to say, the moment his head struck something and he lost consciousness or moved to an altered state of consciousness. I am sure that was not intended to be a chilly or callous view of the loss suffered by the plaintiff in this matter.

The sum and substance of my decision is that for the reasons I have enunciated I find that Boeing has established now the third element of the government contract defense. It fills in the missing aspect of that defense since I have determined earlier this afternoon that the Motion for Reconsideration with respect to the first defense should be denied.

Accordingly, I will enter an Order which enters judgment for the defendant and against the plaintiff.

I want to thank counsel for the parties for their presentation of this matter. It took some time getting the case finally to issue, but it did come to issue and was crisply presented at this point, and I hope properly resolved. The Court is in counsel's debt in that respect.

We are in recess.

(COURT RECESSED AT 1:48 P.M.)

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1142

KOUTSOUBOS, SPIROS, Administrator
of the Estate of James Koutsoubos,
Appellant

v.

BOEING VERTOL, DIVISION OF THE
BOEING COMPANY AND THE BOEING COMPANY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 81-1080)

Argued: December 14, 1984
Before: GARTH and HIGGINBOTHAM,
Circuit Judges, and
McCUNE, *District Judge**
(Filed February 27, 1985)

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

This is an appeal from a final judgment of the district court for appellees Boeing Vertol and its parent, The Boeing Company (collectively referred to as "Boeing"), in a suit brought under the Death on the High Seas Act, 46 U.S.C. §§ 761-768 (1982), by appellant Spiros Koutsoubos, administrator of the estate of James Koutsoubos. Because we find no error of fact or law in the district court's conclusion that Boeing had made out the elements of a "government contractor" defense, we will affirm.

I.

Decedent James Koutsoubos was one of three Navy crewmen killed during a training flight off the Florida coast on March 21, 1979, when the helicopter they were aboard hit the water and turned upside down. Appellant filed suit alleging that the helicopter, manufactured by Boeing for the Navy, was unsafe due

to design defects. Boeing moved for summary judgment, contending that government contractors who supply products made to government specifications are shielded from liability to third parties.

In a precise and thoughtful opinion, Judge Pollak ruled that Boeing would have to prove three elements in order to make out this affirmative defense: (1) that the government established the specifications for the helicopter; (2) that the helicopter met the government's specifications in all material respects; and (3) that the government knew as much as or more than Boeing about the hazards of the product. *Koutsoubos v. Boeing Vertol*, 553 F. Supp. 340 (E.D. Pa. 1982). On the basis of the affidavits and exhibits submitted the district court granted partial summary judgment, finding that the first two elements of the defense had been established. "[T]he Navy chose the 'material' design features for this helicopter; that is, the Navy established the specifications crucial to plaintiff's allegations of defective design. Inspection by the Navy revealed that these specifications had been satisfied." 553 F. Supp. at 344 (footnotes omitted). After a subsequent evidentiary hearing, Judge Pollak found that the third element of the defense had also been established, and therefore entered final judgment for Boeing.

Prior to that hearing, appellant moved for reconsideration of the partial summary judgment, contending that the deposition testimony of two Boeing employees showed that the government had not "established" the helicopter's specifications. Though the district court agreed that some specifications originated with Boeing, it found that these proposals simply initiated a "back-and-forth" discussion between Boeing and the Navy, with the Navy making all final decisions as to the helicopter specifications.

Accordingly, the motion for reconsideration was denied. Appellant contends that this denial was reversible error.

II.

It is clear that federal common law provides a defense to liabilities incurred in the performance of government contracts. *See, e.g., Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940); *Myers v. United States*, 323 F.2d 580 (9th Cir. 1963); *Dolphin Gardens v. United States*, 243 F. Supp. 824 (D. Conn. 1965). This court has not previously had occasion to define the contours of such a defense. *Cf. Brown v. Caterpillar Tractor Co.*, 696 F.2d 246 (3d Cir. 1982) (applying Pennsylvania law). The three-part test adopted by the district court in this case was first announced by Judge Pratt in *In re "Agent Orange" Product Liability Litigation*, 534 F. Supp. 1046 (E.D.N.Y. 1982), and has since been applied in a number of products liability cases involving military contractors. *McKay v. Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S. Ct. 711 (1984); *Shaw v. Grumman Aerospace Corp.*, 593 F. Supp. 1066 (S.D. Fla. 1984); *Schoenborn v. Boeing Co.*, 586 F. Supp. 711 (E.D. Pa. 1984); *Hubbs v. United Technologies*, 574 F. Supp. 96 (E.D. Pa. 1983). This court, in dicta, has called Judge Pratt's formulation "attractive". *Brown v. Caterpillar Tractor Co., supra*, 696 F.2d at 254 n.17. These cases have advanced a number of public policy justifications for the *Agent Orange* approach, among them:

1. That to hold military contractors liable for design defects could subvert the government's immunity under *Feres v. United States*, 340 U.S. 135 (1950) and *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977) since contractors could pass the cost of accidents along to the government.

2. That holding military contractors liable would "thrust the judiciary into the making of military decisions. Although judges must decide cases arising from fields of endeavor of which they know little, their otherwise omnicompetence confronts its limits in military matters. At this point, it must be acknowledged, separation of powers becomes a proper concern." *McKay, supra*, 704 F.2d at 449.

3. That military contractors are often unable to negotiate over specifications which, due to defense requirements, involve risks that would be deemed unreasonable for ordinary consumer goods.

4. That the *Agent Orange* approach encourages military contractors to work closely with military authorities in the development of equipment.

5. That the third prong of the *Agent Orange* test creates on the part of the contractor a duty to warn, so that military procurement decisions are made on the basis of readily available information.

We find these considerations persuasive, and believe that the three-part *Agent Orange* test applied by the district court is a workable approach to the government contractor defense in cases involving products developed specially for the military that are alleged to be defectively designed. We need not decide at this time what form the government contractor defense might take in other circumstances. *See also In re All Maine Asbestos Litigation*, 575 F. Supp. 1375 (D. Me. 1983); *Johnston v. United States*, 568 F. Supp. 351 (D. Kan. 1983).

In approving the *Agent Orange* approach, we are immediately confronted with a recurring problem of interpretation: the meaning of the requirement that the government "establish" the specifications. In *Agent Orange* Judge Pratt rejected the contention that "any role by a defendant in preparation of the specifications" should defeat the defense, but he also

noted that "[i]f it should appear that the contract set forth merely a 'performance specification', as opposed to a specified product, then the government contract defense would be far more restricted than as described here." 534 F. Supp. at 1056. The logic of this middle position is clear -- if *any* involvement by the contractor would defeat the defense, there would be no incentive for contractors to work closely with the military; on the other hand, where there is no government participation in the preparation of specifications the rationales for the defense do not apply.

In *McKay, supra*, the Ninth Circuit rephrased the *Agent Orange* test to reflect these considerations. Under their formulation, the defense can be made out where the government established *or approved* the specifications. 704 F.2d at 451. This is the standard the district court applied in denying appellant's motion for reconsideration. Appellant argues that if a contractor may avail itself of the *Agent Orange* defense merely by securing the government's approval of specifications, without the government exercising some "compulsion" or "control", then the rationales for the defense are circumvented, just as where the government plays no role at all.

We do not, however, believe that this is the situation envisaged by the "approval" standard applied in *McKay* and the instant case. In *McKay* the court remanded for trial on the question of whether the government "approved" the specifications "by examining and agreeing to a detailed description of the workings of the system," 704 F.2d at 453. Here the district court found a "continuous back-and-forth" between Boeing and the Navy, "with the Navy always, expectedly and properly, having the responsibility for and exercising responsibility for making final decisions as to specifications." After reviewing the record, we are convinced that there was sufficient

government participation to bring this case within the *Agent Orange* rule.

We have also considered appellant's contention, first raised at oral argument, that even under the district court's "approval" standard issues of material fact remain to be tried, and find it to be without merit.

CONCLUSION

For the foregoing reasons the judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit